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LAW OFFICES
KOTEEN & NAFTALIN, L.L.P.
1150 CONNECTICUT AVENUE
WASHINGTON, D.C. 20036-4104

TELEPHONE
(202) 467-5700
TELECOPY
(202) 467-5915

BERNARD KOTEEN*
ALAN Y. NAFTALIN
ARTHUR B. GOODKIND
GEORGE Y. WHEELER
MARGOT SMILEY HUMPHREY
PETER M. CONNOLLY
CHARLES R. NAFTALIN
GREGORY C. STAPLE
R. EDWARD PRICE
JULIE A. BARRIE
* SENIOR COUNSEL

July 13, 1998

**RECEIVED**

JUL 13 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.,
Washington, D.C. 20554

Re: CC Docket No. 98-92

Dear Ms. Salas:

Transmitted herewith, on behalf of TDS Telecommunications Corporation (TDS Telecom), are an original and 12 copies of its comments on the Hyperion Petition for Preemption of Tennessee Regulatory Authority Order, CC Docket No. 98-92. An additional copy of this pleading, along with a diskette copy, are being hand delivered to Ms. Janice M. Myles at the Common Carrier Bureau (Room 544). A paper copy of the comments is also being taken to the Commission's contractor for public service records duplication, ITS.

In the event of any questions concerning this matter, please communicate with this office.

Very Truly Yours,

Margot Smiley Humphrey

Margot Smiley Humphrey

Enclosure

cc (w/enc.) by hand delivery:
Ms. Janice M. Myles (FCC Room 544)
International Transcription Services, Inc. (ITS)

by regular mail:
Lisa M. Zaina, Esq. (OPASTCO)
Marie Guillory, Esq. (NTCA)
David, Cohen, Esq. (USTA)

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**BEFORE THE**
**FEDERAL COMMUNICATIONS COMMISSION**
**WASHINGTON, D.C. 20554**



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| In the Matter of | ) | |
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| HYPERION PETITION FOR | ) | |
| PREEMPTION OF TENNESSEE | ) | CC DOCKET NO. 98-92 |
| REGULATORY AUTHORITY | ) | |
| ORDER | ) | |

# OPPOSITION OF TDS TELECOM

Margot Smiley Humphrey
KOTEEN & NAFTALIN, L.L.P.
1150 Connecticut Avenue, N.W.,
Suite 1000
Washington, D.C. 20036
(202) 467-5700

July 13, 1998

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## I. SUMMARY

TDS Telecom and its Tennessee LEC subsidiaries oppose Hyperion's request for preemption, pursuant to §253 of the Telecommunications Act of 1996, of both (a) the TRA's denial of expanded authority to provide service in Tennessee Telephone Company's service area and (b) §65-4-201(d) of the Tennessee Code Annotated. The TRA Denial Order explained that the action falls within the exception found in §253(b) to this Commission's duty and authority to preempt actions challenged as obstacles to competition violating §253(a) of the federal law whenever a state's laws and actions are necessary to protect certain consumer and universal service interests. The TRA agreed that the Tennessee statute seemed to conflict with the later-enacted federal law, but held that restricting the statewide scope of Hyperion's authority is necessary to maintain internal universal service support flows, such as the business and residence local rate differentials, that permit affordable service to all residential and small business customers in small and rural LEC service areas within Tennessee. Loss of large business customers to a competitor free to target only the large customers whose revenues support universal service would reduce the universal service support available for affordable service to customers in high cost areas that now benefit from the internal intrastate universal service support flows the TRA acted to protect. The §253(b) exception and other provisions in the federal law such as §251-52, §253(f) and §214(e) clearly demonstrate that Congress believed a delicate balance was needed to prevent damage to rural customers from premature or unrestricted competitive entry in rural areas. The Denial Order met the Act's tests of consistency with the

universal service mandates in §254 and had the proper nexus to appropriate state concerns for consumers.

The TRA explained why the restriction is competitively neutral since it applies equally to all applicants. In fact, Hyperion is not in the same competitive position as Tennessee Telephone to begin with, since the incumbent alone bears universal service, carrier of last resort and other regulatory duties and burdens to protect Tennessee consumers, such as a pricing structure geared to universal service rather than ability to compete. Hyperion does not face these obligations as a CLEC. Hyperion, instead, targets premium business customers that offer the greatest opportunity for profit. To hold that every arguable obstacle to competition negates competitive neutrality under §253(b) is to read the exception right out of the federal statute. Moreover, the federal universal service mechanism has increased, rather than alleviated, the problem for a largely rural state like Tennessee to generate internal universal service support and 75% of the federal support for universal service for its high cost areas. Tennessee could not rely on that avenue to protect its consumers.

Even if preemption of the Denial Order was proper, the Commission should not preempt the entire provision of Tennessee law. The federal law empowers the Commission only to preempt law to the extent necessary to prevent a violation or inconsistency with the 1996 Act. Preempting in advance all future TRA applications of the state law would rob it of its powers under other exceptions and provisions that would justify denial of an application to target competition towards capturing a small LEC's customers essential to its internal universal service support flows. The Commission's review of the Texas law demonstrated better the need to allow

for state interpretation and application of state laws, especially those adopted before the 1996 Act.. And preemptions involving Wyoming and Texas dealt with different statutes and factual contexts that required greater and longer prohibitions to competition than the special scrutiny required by the plain language of the Tennessee law.

Finally, even if the Commission were justified in preempting the TRA Denial Order and the law, it would still not be necessary or lawful for the Commission to order grant of Hyperion's application as filed or to dictate the terms upon which the TRA must permit its entry. For example, he Commission cannot preempt in a way that would prejudge or deny due process to Tennessee Telephone or any other Tennessee small company in the state's consideration of its §251(f) exemption from the onerous duties under §251(c), state discretion to modify or suspend the requirements of §251(b) or any other state authority that is lawful, given the 1996 Act's strictly limited preemption of state law.

The Commission should, therefore, reject the request for wholesale preemption and uphold the TRA's Denial Order and the Tennessee law as valid under the §253(b) exception.

**BEFORE THE**
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OPPOSITION OF TDS TELECOM

TDS TELECOM, with and on behalf of its four wholly-owned subsidiaries in Tennessee, Tennessee Telephone Company (Tennessee Telephone), Concord Telephone Exchange, Inc, Humphreys County Telephone Company and Tellico Telephone Company (TDS Telecom or TDS), and by its attorneys, files these comment in opposition to the Petition for Preemption filed by Hyperion of Tennessee, L.P. (Hyperion) on May 29, 1998. The four listed TDS Telecom companies serve in 16 Tennessee counties as incumbent local exchange carriers (ILECs)and satisfy the definition of "rural telephone company" in the Telecommunications Act of 1996

(1996 Act).[1] The application denied by the Tennessee Regulatory Authority (TRA), which gave rise to Hyperion's request for preemption, sought expansion of the territorial coverage of Hyperion's Certificate of Public Convenience and Necessity (CCN) to permit it to compete for the business of selected customers in the areas Tennessee Telephone already serves pursuant to universal service and carrier of last resort obligations. TDS Telecom's Tennessee ILECs will be adversely affected if the Commission grants this preemption petition in whole or in part. Preemption will affect the authority, and probably the terms and conditions, under which Hyperion and other competing local exchange carriers (CLECs) may provide telecommunications services to customers located in markets served by the TDS Telecom ILECs in the state. Hyperion seeks wholesale Commission preemption of §65-4-201(d) of the Tennessee Code as a violation of 47 U.S.C. §253, added to the 1934 Communications Act by the 1996 Act. TDS Telecom demonstrates in opposition that the TRA's denial of Hyperion's territorial expansion application did not violate section 253, but was, in fact, a proper exercise of the authority reserved to the states by §253(b). Moreover, even if the TRA's denial were subject to preemption, §253(d)'s limitation of Commission preemption to solely what is necessary to remedy violations of or inconsistencies with §253 precludes the requested preemption of the Tennessee statute at issue. Excessive preemption would interfere with other indisputably lawful means states have available under the 1996 Act to protect the consumer interests addressed by the Tennessee law. Indeed, there is other statutory authority, i.e. §§ 253(f), that could justify

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[1] 47 U.S.C. §153(47). TDS Telecom owns a total of 106 ILECs in 28 states, all of which are defined as "rural telephone companies" under the 1996 Act.

denial of Hyperion's application, at least in its current form with no undertakings that would protect rural Tennessee consumers. And, in any event, even a lawful preemption of the TRA's denial of the application to expand Hyperion's service territory and the Tennessee law would not justify a Commission order directing the TRA to grant Hyperion's application for expanded authority.

## II. THE TRA LAWFULLY DENIED HYPERION'S APPLICATION TO ENLARGE ITS CCN

### A. The 1996 Act Does Not Preempt State Statutes and Decisions Automatically

Hyperion's arguments to the TRA boil down to the repeated assertion that §253 and the Commission's decisions on other state restrictions had invalidated the Tennessee law and the TRA could not deny its application and leave the TDS Telecom ILEC as the "only" authorized local exchange carrier (presumably meaning the only LEC other than wireless licensees). In its Brief (p. 6), for example, Hyperion demanded that the TRA grant its request to expand its service area because "the limitations imposed by §65-4-201(d) have been removed and Hyperion requests authority to provide service in Tennessee Telephone's service area." It thus claimed a right (p. 8) "in accordance with the current state of the law," as Hyperion reads it, to a Tennessee CCN under the general mandate in §65-4-201(c). That subsection requires virtually automatic grant of a competing carrier's application if the applicant will obey Commission requirements and has the "managerial, financial and technical abilities to provide the applied for services." However, §253(d) does not provide for such automatic voiding of a particular state law alleged to

conflict with §253(a). That section, instead, provides the state and others with the right to "notice and an opportunity for public comment," and requires the Commission to "determine[ ] that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates or is inconsistent with this section." Even then, Congress instructed this Commission to preempt state enforcement only "to the extent necessary to correct such violation or inconsistency."

The Supreme Court's landmark Louisiana decision[2] explained that Congress or an agency acting under congressionally delegated authority may lawfully preempt only when Congress, in enacting a federal statute, expresses a clear intent to preempt state law; there is outright or actual conflict between federal and state law; compliance with both federal and state law is physically impossible; there is implicit in federal law a barrier to state regulation; Congress has "occupied an entire field of regulation"; or state law stands as an obstacle to accomplishing the full objectives of Congress. In this case, the preemption must be explicit because §601(c)(1)of the 1996 Act specifically precludes any impact on state law that is not expressed in the law itself. The plain language and clear intent of Congress concerning preemption under §253 require case-by-case scrutiny by the Commission of whether a state law or action conflicts with §253(a), a determination on any demonstration that the exceptions in §253(b), (c) or (f) permit the law or action to stand, and, if there is cause for any preemption, the minimum interference with state law necessary to rectify the identified state departure from the federal law.

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[2] Louisiana Pub. Serv. Comm'n v. F.C.C., 476 U.S. 355, 368-69 (1986).

B. The TRA Provided Sufficient Justification for Denying Hyperion's Application

1. Denial under §253(b) Was "Consistent" with §254 of the 1996 Act and "Necessary" to Protect Legitimate State Consumer Interests Imperiled by Premature Entry in Rural Tennessee Areas

Hyperion claims (Pet. at iii) that the "TRA denied Hyperion's application on the grounds that Section 65-4-201(d) prohibits competition in Tennessee Telephone's territory." But the TRA did no such thing. The TRA recognized[3] that §253 of the 1966 Act "appears to preempt TCA §65-4-201(d)." However, it concluded (p. 8) that preemption is not warranted because the Tennessee law "is essential to preserving universal service within Tennessee, protects the public safety and welfare, ensures the continued quality of telecommunications services and safeguards the rights of consumers." More specifically, it held that the §253(b) exception allowed Tennessee to enforce the law because Tennessee has many small LECs, including cooperatives, that serve few customers and typically must rely on their few select business customers for the revenues from local rates that are necessary to support their public-policy-driven "provision of affordable service to ... [their] residential customers." Loss of the large business customers' revenues to competition, explained the TRA, threatens to force residential and small business rate increases that could, in turn, jeopardize universal service in the state. The TRA quoted (p. 9) from the preamble to the Tennessee legislation enacting TCA §65-4-201(d), which it read as evidence of the legislature's intention to preserve universal service in the course of encouraging

[3] Order Denying Hyperion's Application for a Certificate of Public Convenience and Necessity to Extend Its Service Territory into Areas Currently Served by Tennessee Telephone Company, Docket No. 98-0001, p. 3 (decided on March 10, 1998) (Denial Order).

competition, especially in the transitional period while universal service mechanisms are under review. The TRA decided that the rural entry section of the legislation addressed a legitimate concern that premature rural competition could "have substantial harmful effects on universal service in said areas" and that rural customers could be deprived of statewide technological advances, as well as universal service during the early stages of competition.

The 1996 federal legislation also pursues the goals of competition and universal service and seeks rural as well as urban infrastructure and service advances.[4] Congress juxtaposes and juggles these sometimes competing goals in a number of ways. One of these balancing acts is evident in §253, which, in the course of establishing a basic national policy of competition in telecommunications, recognizes the need for some exceptions. In consequence, 253(b) expressly reserves state authority to impose requirements necessary "to preserve and advance universal service, protect the public safety and welfare, insure the continued quality of telecommunications services, and safeguard the rights of consumers." Hence, at the very heart of the pro-competitive provision in the 1996 Act, lies a recognition that states, too, need to act not only consistent with competition -- that is, "on a competitively neutral basis" -- but also to preserve the availability of affordable and advancing communication resources to the state's consumers — that is, "consistent with section 254," the universal service provision.

Thus, although the Tennessee law was enacted before §253 became law, Tennessee's legislative purposes, relied upon by the TRA to support application of §253(b), are manifestly

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[4] See, e.g., §§214(e), 251-52, 253, and 254.

consistent with the universal service and rural infrastructure development mandates of §254. The TRA, the state's telecommunications expert familiar with rural markets in the state, explicitly confirmed as a fact in reaching its March 10, 1998 decision to deny Hyperion's application to provide service in rural ILEC areas (Denial Order at 9) that "today, absent 65-4-201(d), the universal service objectives in Tennessee would not be advanced in rural areas and the goals of federal universal service may be irreparably undermined." The TRA and the Tennessee Legislature, knowledgeable about conditions in rural Tennessee, evidently do not find vague claims (e.g.,Application at 11) of immediate net benefits to "Tennessee customers" and the Tennessee infrastructure a sufficient safeguard for rural customers, and instead believe that deferral of selective competition until the transition to competition and the adjustment of universal service mechanisms has stabilized the vulnerable rural service conditions is the necessary course of action to safeguard the rural customers of Tennessee. For this Commission to substitute its judgment for the Tennessee legislature and the TRA and to rule that the transitional deferral of premature competition in rural Tennessee study areas is not "necessary" would make a mockery of the reservation of state authority to protect the interests of Tennessee and its customers contained in §253(b). Hyperion has provided no evidence to demonstrate that the state's judgment is flawed, let alone to show any inconsistency between the plain language of §254 and the disposition of Hyperion's application based on Tennessee lawmakers' and regulators' determination that premature rural competition would thwart the shared state and federal goals of universal affordable service and advancing technology.

2. The TRA's Action Was Competitively Neutral

Hyperion contends that the Tennessee law is not "competitively neutral" because it freezes out new entrants while the incumbent alone may operate in the disputed areas served by ILECs with fewer than 100,000 aggregate access lines in the state. The TRA explained (pp. 10-11) that the law applies even-handedly to competitors, is subject to legislative review every two years, and that judicial challenges to other Commission pro-competition rulings ousting state authority in connection with the 1996 Act's requirements suggest that the Commission's cramped view of the proper state role in the transition to competition under the 1996 Act does not necessarily coincide with the intent of Congress.

The fact is that Hyperion and all other potential competitors with freedom to serve only the most profitable customers and geographic areas within the rural ILEC's study area and to withdraw their services whenever they choose are not similarly situated to Tennessee Telephone and other rural ILECs in Tennessee with fewer than 100,000 lines. Unlike competing local exchange carriers (CLECs) such as Hyperion, ILECs in Tennessee must comply with longstanding public utility obligations as the "carrier of last resort" that include serving customers throughout their local exchange service areas upon reasonable request and continuing to provide even unprofitable services until they obtain state approval to withdraw service. Hyperion's application did not seek to enter Tennessee Telephone's area on the same terms and conditions under which Tennessee Telephone holds its CCN. Hyperion makes much

(Application at 1) of its supposed decision not to seek the "heightened obligations set forth in Section 251(c)" at this time and asserts (Pet. at 3) that it "expected only that all competing LECs would abide by the obligations imposed on all local exchange carriers under §251(a) (general duties of telecommunications carriers) and§251(b) ( general duties of all local exchange carriers)." In reality, however, §251(c) is just a current exception that contrasts with the long list of "heightened obligations" under which Tennessee Telephone already operates, but Hyperion would not. For example, Hyperion does not offer to provide area-wide service on request as the carrier of last resort or even to accept an obligation not to abandon service at will. While it points out that its Tennessee customer base is only a fraction of Tennessee Telephone's (Pet. at 19), it forgets that Tennessee Telephone lacks Hyperion's freedom to target its services to only the business customers and denser geographical areas it believes will be profitable to serve.[5] Hyperion is free of virtually all the burdens and expenses of state and federal regulation that the TDS Telecom ILECs must shoulder and recover from its customers. The notion that Congress intended the "competitive neutrality" interests of a competitor with almost no public obligations or proposals to outweigh a state's interest in "preserv[ing] and advanc[ing] universal service, protect[ing] the public safety and welfare, ensur[ing] the continued quality of telecommunications services, and safeguard[ing] thethe rights of consumers" is frivolous.

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[5] ComparingHyperion's targeted customer base to Tennessee Telephone's universal service-driven customer base is a classic "apples to oranges" comparison and is entitled to no weight. Hyperion stated in its November 6, 1997 prospectus that its affiliated CLEC operations had sold 16,000 access lines, connected 1,603 buildings with 17 networks in 35 cities as of September 30. 1997.

It is also competitively neutral to restrict from entry carriers whose operations will be consistent with state support mechanisms. Hyperion has no duty or incentive to structure its rates to preserve the business-to-residence support flows that the TRA said the Tennessee law is designed to preserve as long as they are needed. Indeed, Hyperion's economic decision to expand no doubt took into account its ability to compete with Tennessee Telephone for premium high-volume business customers owing to the disparity in their regulatory obligations. That disparity would give Hyperion a distinct advantage in competing because the support and ubiquitous service obligations applicable solely to ILECs require the public-policy-driven pricing structure the TRA referenced in the Denial Order (pp. 8-9) for the very customers CLECs seek to attract. Moreover, Hyperion's attack on the TRA's effort to preserve implicit support flows (Pet. at 11-12), such as the longstanding business-to-residence price differential, is simply wrong about the federal statute and the intent of Congress. The only reference or requirement to make support explicit is in §254(e), a provision dealing exclusively with federal support mechanisms.[6] Tennessee is free to maintain its current intrastate support structure, and the TRA is well aware that there is no state support in place to substitute for remaining implicit support.

The TRA's only rational course at this time is to impose strong universal service safeguards for rural ILEC areas, as contemplated by the Tennessee law. The federal support program does not relieve this necessity. The Commission's implementation of the 1996 Act's

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[6] The requirement for explicit state and federal support in §253(g) of Senate-passed S.652 was deleted in framing the enacted conference version of §254, which took out numerous previous Senate references specifying the reach of state and federal responsibility.

universal service and support mandates is now in disarray because of disputes with Congress over the schools and libraries program and the difficulty -- which far exceeded the Commission's expectations -- of developing a valid cost proxy model for rural ILECs. How the Commission will deal with rural ILECs after the current transitional arrangements is unknown. Its universal service policy at present foists 75% of the federal high cost mechanism onto the states for recovery from state sources. Moreover requiring state elimination of implicit subsidies under §254 would only increase the states' uncertainty about how each state's universal support obligations will have to be funded. In the present circumstances, it would be unconscionable for the Commission to preempt the TRA's effort to protect the essential intrastate support flows through the use of a competitively neutral requirement that only defers entry by carriers that will likely undermine Tennessee's internal support flows.[7]

3. The Commission Precedents Do Not Justify Preemption of §65-4-201(d) or the TRA's Application of §253(b)

Hyperion contends that the Commission's decisions to preempt state legislation and Commission actions in Wyoming and Texas compel preemption of the Tennessee law and the TRA's Denial Order. The cases do not, of course, deal with the particular Tennessee law or factual situation presented here, and section 253(d) itself requires case-by-case notice and comment proceedings before the Commission takes the serious Constitutional step of preempting

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[7] Preemption would also contradict Chairman Kennard's assurances to small and rural telephone companies that the Commission will not impair their existing, demonstrably effective sources of universal service support until a suitable substitute is in place. Remarks by William Kennard, Chairman, FCC, to USTA's Inside Washington Telecom, Apr. 27, 1998); FCC Web Page, http://www.fcc.gov/Speeches/Kennard/spwek813.html.

state law under authority delegated by the U.S. Congress. Although Hyperion describes the laws as "virtually identical," the other states' statutes were different from the Tennessee law they are asserted to control. [The Tennessee legislature expected §65-4-201(d) to be reopened every two years to reexamine the transitional distinction in treating applications to serve areas served by ILECs with fewer than 100,000 access lines (**T.C.A. §65-5-211**).]. In contrast, the Wyoming statute barred entry under what was, in effect, a rural ILEC veto provision that would apply until at least 2005, ten years after the adoption of the 1996 Act, and for 36 months beyond that if the ILEC had not recovered its investment for required upgrades, and in any event until the CLEC applicant shows that it plans to serve the entire service area.[8] The Texas law limited a resale certificate solely to resale of an ILEC's services and, for a facilities-based CLEC certificate, limited the applicant's reliance on resale, required a six year build-out commitment or expedited service upon customer demand, enacted permanent extra requirements for small ILEC areas even if the ILEC became a CLEC or voluntarily agreed to CLEC interconnection, and restricted CLEC facilities-based entry to contiguous, reasonably compact areas no smaller than 27 square miles in size.[9]

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[8] Wyo. Stat. Ann. Secs. 37-15-101 et seq. The Commission said that a "'temporary' ban on competition that lasts for a minimum of 9 years and a maximum of twelve years from the date of enactment of the 1996 Act is, for all practical purposes, an absolute prohibition." In the Matter of Silver Star Telephone Company, Inc Petition for Preemption, Declaratory Ruling and Injunctive Relief, CCBPol 96-10, FCC 96-397, ¶39 (CCB, 1996), recon. pending (Silver Star).

[9] In the Matter of Public Utility Commission of Texas, et al., CCBPol.Pol 96-13, et al., (rel. Oct. 1, 1997).

The cases turn on whether the regulatory authority's determination satisfied the §253(b) reservation of state power to protect crucial consumer protection and telecommunications availability interests. However, to suggest that competitive neutrality precludes any result that constrains entry by a competitor, but lets the incumbent continue to serve, would fatally undermine the authority Congress reserved for state consumer protection as an express exception. As we observed in the previous section, to read the competitive neutrality test to prevent a state from preserving the very universal service and infrastructure development interests of its citizens that §253 is intended to protect effectively reads the whole subsection out of the law. What reason would Congress have to enact a provision that preserves some state laws and consumer protection powers, even though they may be regarded as barriers to entry, but then to turn around and disqualify any law or application from such relief if it is, in effect, an obstacle to entry by any applicant to compete with the universal service provider? The circular reasoning simply rules out state assessment of the impact on the protected state interests and state choice of the necessary safeguards under §253(b). Congress certainly did not intend competitive neutrality to raise the rates for the highest cost rural customers -- customers that CLECs like Hyperion typically do not even seek to serve. And, in fact, in Hyperion's own November 6, 1997 prospectus, the company stated as its growth strategy the "objective to be the leading local telecommunications services provider to small, medium and large *businesses, governmental and educational end users*" (emphasis added).

The question of what is necessary to protect a state's public and consumer interests is also closely tied to the facts. When the Commission preempted state laws and decisions in the earlier cases Hyperion relies upon, it believed it had adopted a permanent universal service mechanism, subject only to expedited proceedings to finish its proxy design efforts and fine-tune that model for rural LECs. Speedy implementation of effective universal service mechanisms for the competitive environment is what Congress intended by the deadlines it placed on universal service implementation in §254(a). The massive and unanticipated confusion and controversy now surrounding the universal service plan, discussed above, have all come about -- or have at least grown significantly in severity and complexity -- after these earlier preemptions. The current state of the federal universal service plan and the deeply troubling uncertainties it creates about state support responsibilities and resources justifiably preclude TRA confidence that the universal service and rural infrastructure development Congress intends will be advanced, rather than devastated, in Tennessee (whenever the federal mechanism may be completed). Accordingly, the TRA applied the §253(b) exception to the Tennessee law quite properly by deferring proposed rural entry by Hyperion that would not improve area wide universal service or provide another carrier of last resort, but could substantially raise the cost to consumers for service from the only carrier subject to universal service obligations. To reject the TRA's judgment that the §253(b) conditions are satisfied by its application of T.C.A. §65-5-201(d) by characterizing the law as "an absolute prohibition against competition" (Pet. at 19) and consequently as not "competitively neutral" is to place the interests of Hyperion above the

interests of Tennessee and its rural citizenry. In sharp contrast, both 253(b) of the 1996 Act and Tennessee's §65-4-201(d) were enacted to let the state safeguard its citizens during the disruptive transition to competition. In short, if Congress had meant to outlaw the prohibition of every obstacle to "any entity's ability to provide any service" that involves deferring what a state perceives as harmful impacts from premature competition, as Hyperion claims (Pet. at 20, emphasis in the original) that §253 requires, Congress would have ended §253 after subsection (a) and omitted the exceptions in (b), (c) and (f) and the Commission proceedings required by subsection (d). Since it instead adopted exceptions to the ban on impediments to competition, the Commission should not preempt Tennessee's reliance on an exception as if Congress had left state relief out of the section.

## III. THERE IS NO LEGAL BASIS FOR WHOLESALE PREEMPTION OF §65-4-201(d)

Even if the Commission could legally preempt the TRA's application of §65-4-201(d), there would still be no basis for the drastic step of preempting the law itself. While the TRA acknowledged (Denial Order at 8) that there appeared to be a conflict with §253(a), the Tennessee law need not be read to require rejection of applications that do not meet the standards of subsection 253(b) (or the other exceptions enacted by Congress). The Tennessee law was passed before the 1996 Act, but §253(b)'s purpose is to preserve state authority whenever it meets that section's standards. Subsection (d)'s admonition to the Commission to preempt only "to the extent necessary to correct such violation or inconsistency" with §253(a) or (b) lends

support to restraint in preempting state laws, unless they cannot be lawfully applied. The statute explicitly requires the narrowest possible inroads on a state's authority when a violation exists. Hyperion's request to preempt both the statute and the Denial Order would substitute a much more drastic preemptive approach than what Congress enacted.

In the Texas case, the Commission wisely moved in the direction of Congress's requirement for restraint when it declined to preempt many of the challenged provisions of that state's statute because the state commission had interpreted the law in a way that avoided violations to the Commission's satisfaction. Here the TRA has interpreted the Act in a way that satisfies §253(b), seen in the context of the recent course of the transition to competition and the search for sustainable universal service measures. The Commission pointed out in Silver Star (¶45) that the question of whether a law or application that "protects" rural incumbents is "necessary" to achieve the public interest objectives of §253(b) is "fact specific...." The question of necessity under §253(b) obviously cannot be decided in advance and in a factual vacuum. Similarly, whether the application of a state law in a specific situation is competitively neutral can also depend on the factual context, since it affects what differences or similarities in the competing companies' situations are relevant to their relative competitive burdens. Prior wholesale preemption of the Tennessee law would eliminate the state's opportunity to have its laws and actions evaluated under §253(b) and sustained if they satisfy the standards for that exception. In this regard, the Commission has not yet faced the problem that the subsection's tests may conflict. For example, an allegedly non-neutral result, challenged as favoring one

competitor or the incumbent, may well be manifestly consistent with §254 and to the accomplishment of that section's mandates and compellingly "necessary," as the TRA evidently thought in this case, "preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers," that is, dispositive as to the state's ability to meet the other consumer protection needs enumerated in the statutory reservation of state power. This Commission cannot deprive the state of the consumer protection role subsection (b) guarantees by decreeing in advance that the competitive neutrality interest, however weak, will presumptively trump the state's expert assessment of the need for protection of its citizens.

Beyond the importance of facts to a determination under §253(b), a future result reached by a state regulator applying the Tennessee law in light of the Tennessee legislation's public interest purposes could be justified by the additional lawful exception established by §253(f). That subsection allows a state to prohibit competition in a rural LEC's area by any applicant that does not qualify as an eligible telecommunications carrier under §214(e) of the 1996 Act.[10]

Indeed, the Tennessee Statute on its face need not be read as a bar to competitive entry at all. All the provision says is that the mandatory entry, subject to only the most rudimentary standards, adopted to encourage competition in Tennessee under §65-4-201(c) will not apply in

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[10] That provision, like the TRA decision here, gives preference to the incumbent and any competitor that takes on universal service responsibilities. Qualifying under §214(e) somewhat bridges the gulf caused by the disparate regulatory burdens faced by a new, largely unregulated incumbent. It also provides a further consumer safety net because it requires a rural competitor that qualifies for high cost support to stand ready to assume the duties of an area-wide, facilities-based universal service provider under §214(e) if the incumbent relinquishes its status.

areas served by a carrier with fewer than 100,000 aggregated lines in the state.[11] Requiring more stringent examination for an application to compete in areas the legislature singled out in §65-4-201(d) as especially vulnerable to universal service setbacks during the transition to competition would clearly meet the standards of §253(b). This more rigorous scrutiny would also provide a chance to obtain information essential to a decision under §253(f). In short, nothing in the 1996 Act mandates outright preemption of the Tennessee law, and Commission preemption would go far beyond "the extent necessary to correct any ... violation or inconsistency," contrary to the explicit directive of the Act.

## IV. THE COMMISSION CANNOT LAWFULLY ORDER THE TRA TO GRANT HYPERION'S APPLICATION TO ENLARGE ITS CCN OR PRECLUDE LAWFUL FUTURE DECISIONS

Even if the Commission could legally preempt the Denial Order and the Tennessee rural ILEC provision, it would not be appropriate for it to order the TRA to grant Hyperion's pending application under the minimal scrutiny procedure in §65-4-201(c), as Hyperion requests (Pet. at 23). In Silver Star (¶47), the Commission declined to direct the Wyoming Commission to reverse its denial of a certificate to Silver Star, leaving the Commission to reconsider its decision consistent with the Communications Act and the Commission's preemption. That wise decision demonstrates proper respect for the state's role and authority. The 1996 Act provides

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[11] Congress demonstrated that its concern with protecting customers in rural areas covers an even broader class than ILEC areas the Tennessee law excludes from virtually automatic certification under §65-4-201(d). The 1996 Act's various safeguards for rural areas, including §§214(e), 251(f) and 253(f), apply to all areas served by carriers that satisfy any part of the four-part definition of rural telephone company in 47 U.S.C. §153(47).

independent state authority, under separate legal standards, should the state choose to exercise it, to deny a CLEC authority unless it undertakes to provide universal service throughout the ILEC's service area pursuant to §253(f) and §214(e) and to deny a CLEC interconnection pursuant to §251(b) and/or (c), without regard to the §253(a) ban on barriers to entry or competitive neutrality. Congress clearly did not consider that competitive neutrality should inevitably outweigh the TRA's assessment of the consumer and ILEC impacts of those options. Thus the Commission should not foreclose future state balancing of the §253(b) purposes or exercises of these other state prerogatives by wiping the Tennessee law off the books because it does not condone its exercise in a particular factual setting. For example, the Commission should specify (a) that any preemption grounded on failure to satisfy the §253(b) exception has no precedental significance limiting the TRA's future discretion in applying the §251(f) standards; (b) that due process ensures the TDS Telecom ILECs the full termination proceeding and ruling §251(f)(1) contemplates if Hyperion or another CLEC makes a subsequent bona fide request for interconnection under §251(c) or if Tennessee Telephone or another rural ILEC requests modification or suspension of the §251(b) obligations under §251(f)(2): and (c) that due process guarantees other Tennessee ILECs full TRA consideration of any §253(b) or §251(f)(1) or (2) issue that arises hereafter.

In particular, the Commission should be careful not to take any action here that would give short shrift to the standards in §251(f) for terminating a rural ILEC's §251(c) exemption or granting a modification or suspension of the §251(b) requirements. Hyperion has not been